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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

IN RE CARRIER IQ, INC. CONSUMER  
PRIVACY LITIGATION

Case No. 12-md-2330-EMC

CLASS ACTION

THIS DOCUMENT RELATES TO ALL  
CASES

**NOTICE OF MOTION AND MOTION  
FOR APPOINTMENT OF INTERIM  
LEAD CLASS COUNSEL AND  
PLAINTIFFS' LEADERSHIP  
STRUCTURE; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Date: July 12, 2012  
Time: 2:30pm  
Courtroom: 5

**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on July 12, 2012, at 2:30 p.m. or as soon thereafter as the matter may be heard by the Honorable Edward M. Chen of the United States District Court of the Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California, Courtroom 5, 17th Floor, Strange & Carpenter; Robbins Geller Rudman & Dowd LLP; Susman Godfrey LLP; Pomerantz Haudek Grossman & Gross LLP; McNulty Law Firm; and Rothken Law Firm LLP will and hereby do move the Court pursuant to Federal Rule of Civil Procedure 23(g)(3) for an order appointing Strange & Carpenter and Robbins Geller Rudman & Dowd LLP as Interim Lead Class Counsel; an Executive Committee consisting of: Susman Godfrey LLP as Chair, and Pomerantz Haudek Grossman & Gross LLP and McNulty Law Firm as Members; and Rothken Law Firm, LLP as Liaison Counsel, as proposed by this motion.

This motion is based on this Notice of Motion and Motion for Appointment of Interim Lead Class Counsel and Plaintiffs' Leadership Structure, the following memorandum of points and authorities, the declaration of Brian R. Strange in support thereof, the pleadings and the papers on file in this action, the arguments of counsel, and any other matters that the Court may properly consider.

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Pursuant to this Court's May 1, 2012 Pretrial Order, and its May 24, 2012 Order on Briefing on Plaintiffs' Motion to Appoint Lead Counsel ("Orders"), and pursuant to Fed. R. Civ. P. 23(g)(1), this joint application respectfully requests that this Court designate Strange & Carpenter and Robbins Geller Rudman & Dowd LLP as Interim Lead Class Counsel, and appoint an Executive Committee consisting of: Susman Godfrey LLP as Chair, Pomerantz Haudek Grossman & Gross LLP and McNulty Law Firm as Members, and Rothken Law Firm, LLP as Liaison Counsel (hereinafter "Movants"), in the above-titled litigation (the "Action").<sup>1</sup>

## **I. INTRODUCTION**

"The judge must choose the class counsel when more than one class action has been filed and consolidated or centralized. . . . If there are multiple applicants, the court's task is to select the applicant best able to represent the interests of the class." *Manual for Complex Litigation*, Fourth Edition ("Manual" or "MCL 4th"), § 21.271. In evaluating the leadership appointment factors set forth in the applicable case law, Rule 23(g), and the *Manual*, a court should consider the work that will be required to prosecute the particular class action lawsuit. This consideration is, in part, to avoid overstaffing a case and incurring unnecessary fees.

This Action involves the use of specialized software created by Carrier IQ, Inc. ("Carrier IQ") placed on mobile devices, which secretly tracked consumers' personal information. It involves the design, application, and capabilities of the Carrier IQ software, and the conduct of not only Carrier IQ itself, but also at least eight different mobile device manufacturer Defendants,<sup>2</sup> as to alleged violations of both federal and state privacy and wiretapping laws.

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<sup>1</sup> This application is supported by at least 19 other law firms, excluding Movants' own firms: Glancy Binkow & Goldberg LLP; Law Offices of Susan Yoon; Kirtland & Packard LLP; Kershaw Cutter & Ratnoff, LLP; Rosman & Germain, LLP; Blood Hurst & O'Reardon LLP; The Law Offices of David I. Pankin, P.C.; Wites & Kapetan, P.A.; Lynch Daskal & Emery LLP; Law Offices of Joseph Malley; Morelli Ratner PC; Steyer Lowenthal Boodrookas Alvarez & Smith LLP; Goldfard Branham, LLP; Zimmerman Reed, PLLP; Seeger Weiss LLP; Stewarts Law US LLP; Keefe Bartels LLC; Litigation Partners P.L.; and Haggard Parks Haggard & Lewis. Movants respectfully submit that the number of law firms as opposed to number of cases is more indicative of support since filing of multiple cases by the same firms is not meaningful.

<sup>2</sup> Apple, Inc. ("Apple"); HTC America, Inc. and HTC Corporation (together, "HTC"); Huawei Technologies Co., Ltd., and Huawei Devices USA, Inc. (together, "Huawei"); LG Electronics U.S.A., Inc., LG Electronics MobileComm U.S.A., Inc., and LG Electronics Mobile Research U.S.A., LLC (together, "LG"); Motorola Mobility, Inc. ("Motorola"); Pantech Wireless, Inc. ("Pantech"); Research in Motion Corporation ("RIM"); and Samsung Electronics Co. Ltd. (a



1 This proposed leadership and the supporting firms bring an unparalleled level of  
 2 multidistrict litigation (“MDL”) experience and technical expertise to effectively and efficiently  
 3 litigate the Action. The attorneys have been recognized in the field of Internet privacy and data  
 4 breach class action litigation, having commenced and litigated seminal cases in the field,  
 5 including *In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, MDL No. 3:11-  
 6 md-02258-AJB-MDD (S.D. Cal.) (“*Sony Data Security Breach Litigation*”), *In re DoubleClick,*  
 7 *Inc. Privacy Litig.*, No. 00-CIV0641 (NRB) (S.D.N.Y.), and *In re Palm Treo 600 and 650 Litig.*,  
 8 No. C-05-03774 (RMW) (N.D. Cal.), to name a few. Indeed, the expertise of these lawyers in  
 9 the areas of computer forensics, computer systems, privacy/data breach litigation and class action  
 10 practice is unmatched. It is the jurisprudence arising from the cases they have litigated on which  
 11 this type of case rests. Using their expertise and their knowledge of the applicable law, they  
 12 have worked extensively to identify and investigate the facts and claims asserted in this case.<sup>3</sup>

13 Movants have proven experience successfully leading multidistrict litigations, including  
 14 managing cases and lawyers in similar cases. Lawyers who can cooperate with others and can  
 15 take into account and manage, but still consider, often competing interests and viewpoints are  
 16 essential to a successful MDL prosecution. As more fully set forth below, the Proposed Interim  
 17 Lead Class Counsel have already been instrumental in the MDL to date and are committed to  
 18 continuing to consider viewpoints from all Plaintiffs while leading the case.

19 Finally, Movants are fully committed to this litigation and have more than adequate  
 20 capital and personnel to prosecute this Action against their well-funded and deep-pocketed  
 21 adversaries. Their actions to date evidence this expertise and commitment to the success of this  
 22 litigation. Indeed, Proposed Interim Lead Class Counsel have already:

- 23 • Investigated facts and circumstances surrounding the existence of the Carrier IQ  
 24 software at issue in this case prior to the time the news broke. (Declaration of Brian R. Strange,  
 ¶ 2 (hereinafter “Strange Decl.”).);
- 25 • Retained and consulted with the leading computer security experts in the United

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26 Korean company), Samsung Electronics America, Inc., and Samsung Telecommunications  
 America, LLC (together, “Samsung”).

27 <sup>3</sup> In addition to their expertise in this area, Movants are a geographically diverse group having  
 28 firms in Atlanta, Boca Raton, Chicago, Dallas, Houston, Los Angeles, Novato, New Orleans,  
 New York, Philadelphia, San Diego, Washington, D.C., and of course, San Francisco.

1 States, including that members of their team interviewed the expert who broke the news, Trevor  
 2 Eckhart, and having an analysis and forensic breakdown of the software on a phone performed  
 3 by an independent expert to verify before filing a lawsuit, instead of simply relying on the  
 4 technician who broke the news story. (Strange Decl., ¶ 3.);

5 • Filed the first class action complaint, and in some cases the only class action  
 6 complaint, against some of the mobile phone manufacturer Defendants, including Defendants  
 7 Pantech and Huawei;

8 • Participated in the coordination and consolidation under 28 U.S.C. § 1407 before the  
 9 Judicial Panel on Multidistrict Litigation;<sup>4</sup>

10 • Drafted and served an e-discovery data preservation notice upon Carrier IQ;

11 • Created a state-of-the-art electronic document repository to enable the efficient  
 12 sharing of encrypted litigation documents among all Plaintiffs' counsel;

13 • Arranged with all Plaintiffs' counsel and with all Defense counsel a Joint Proposed  
 14 Agenda for this Court's Initial Case Management Conference on May 24, 2012;

15 • Initiated extensive discussions with all Plaintiffs' counsel on the issue of leadership  
 16 and organized Plaintiffs' counsel to help preserve evidence;

17 • Engaged in confidential, substantive exchanges with two manufacturers thus far  
 18 regarding their conduct at issue, in preparation for the consolidated pleading; and

19 • Coordinated with California State Court plaintiffs in *Eckert v. Samsung*  
 20 *Telecommunications America LLC*, Los Angeles Superior Court Case Number BC 474540.

21 For these reasons and those detailed below responding to the issues raised by this Court  
 22 in its May 24, 2012 Order, Movants respectfully request their appointment as requested herein.

## 23 **II. LEGAL STANDARD**

24 Rule 23(g)(3) authorizes the court to “designate interim class counsel to act on behalf of a  
 25 putative class before determining whether to certify the action as a class action.” While Rule  
 26 23(g)(3) does not set forth the standards to be applied in choosing interim class counsel, courts  
 27 have applied the factors set forth in Rule 23(g)(1). *Parkinson v. Hyundai Motor Am.*, No. SACV  
 28 06-345 AHS (MLGx), 2006 U.S. Dist LEXIS 59055, at \*6 (C.D. Cal. Aug. 7, 2006) (citing MCL  
 4th § 21.11); *In re Air Cargo Shipping Serv. Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006).<sup>5</sup>

<sup>4</sup> Movant Strange & Carpenter moved for consolidation in the Central District of California, based on the relationship between Carrier IQ and Core Mobility, Inc. and its Orange County-based parent company, Smith Micro Software, Inc., including that Carrier IQ and Core Mobility, Inc. were founded by the same parties and have linked IP addresses (an IP address linked to the hostname “collector.argus.coremobility.com” actually goes to the hostname “collector.argus.carrieriq.com.”). However, based on representations by Carrier IQ, Strange & Carpenter agreed at the MDL hearing in the spirit of cooperation to send the case to the Northern District, but note this issue warrants further discovery and shows Movants attention to detail.

<sup>5</sup> These factors are: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv)

This Court has addressed these factors and others in its Orders, all of which are addressed below. “In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case.” Advisory Committee Notes to the 2003 Amendments to Rule 23(g). A court may also consider “the attorneys’ ability to command the respect of their colleagues and work cooperatively with opposing counsel and the court.” MCL 4th § 10.224, p. 27. Movants satisfy all of the Rule 23(g) factors and are the counsel best able to represent the interests of the proposed class in the Action.<sup>6</sup>

### **III. ARGUMENT**

Movants’ significant efforts in the early stages of this litigation, their experience in consumer rights class action litigation, including multidistrict litigation and electronic privacy matters, their ability and willingness to commit the resources required to effectively prosecute this Action, and their expressed interest in working with others make them the clear choice for leadership selection here, based on factors set forth by the Court’s Orders.

#### **a. Proposed Interim Lead Class Counsel’s Extensive Investigation of the Carrier IQ Software and Their Substantial Work Developing the Legal Claims Involved in the Action (Rule 23(g)(1)(A)(i))**

In considering a motion for appointment of lead counsel or interim class counsel, a court must consider the work undertaken by that counsel in the case. *See, e.g., Harrington v. City of Albuquerque*, 222 F.R.D. 505, 520 (D.N.M. 2004) (appointing class counsel who had “done significant work in [the] case”). This criterion was addressed by the Court in paragraph 15(d) in its Pretrial Order. In this litigation, Proposed Interim Lead Class Counsel satisfies that requirement far more than any competing applicant group. Indeed, Proposed Interim Lead Class Counsel have been at the forefront of this litigation from the outset and are the primary force

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the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

<sup>6</sup> Significantly, Movants do not have standing alliances with one another, on this case or otherwise. In fact, these attorneys and firms independently filed their respective cases, advocated divergent MDL transferee venues, and at times, opposed each others’ respective positions up to and including at the March 29, 2012 JPML hearing at which the 28 U.S.C. § 1407 motion was heard and adjudicated. In the ensuing weeks, however, much analysis and discussion occurred among these attorneys and, after careful consideration, they decided to collaborate with one another because of their collective belief that doing so would result in the best representation of Plaintiffs’ and other class members’ interests in this litigation.

1 behind the substantive achievements made in this case to date.

2 Proposed Interim Lead Class Counsel's work to investigate and develop the claims at  
 3 issue went far beyond merely learning about the existence of the Carrier IQ software through  
 4 media reports, confirming the reported events, and filing a case. The investigation began in  
 5 October 2011, about six weeks prior to filing of the initial complaint in this Action. After the  
 6 news reports broke, Movants did not race to the Courthouse. Rather, before filing any lawsuit,  
 7 Movants raced to discover the facts. Proposed Interim Lead Class Counsel hired a consultant to  
 8 deconstruct a phone and perform a forensic analysis of the Carrier IQ software, instead of relying  
 9 on Mr. Eckhart,<sup>7</sup> and verified, among other information, that the mobile device could be  
 10 remotely configured to collect and transmit user data off of the device, and that information  
 11 could be collected and transmitted without any notice to the operator of the device. (Strange  
 12 Decl., ¶ 4.) Proposed Interim Lead Class Counsel also determined the types of information that  
 13 could be stored on the device, what information was available in real-time, what information  
 14 could be transmitted off of the device, the collection points of the data, and the unencrypted  
 15 nature of the data. (Strange Decl., ¶ 5.)

16 As part of their ongoing efforts to develop the claims in this litigation, Proposed Interim  
 17 Lead Class Counsel have also developed a comprehensive, secure, state-of-the-art online  
 18 document repository, which will facilitate the sharing of documents among Plaintiffs' counsel.

19 **b. Proposed Interim Lead Class Counsel's and Movants' Experience in**  
 20 **Handling Class Actions and Other Complex Litigation, as Well as Their**  
 21 **Knowledge of the Subject Matter, Supports Approval of Their Requested**  
**Leadership Structure (Rule 23(g)(1)(A)(ii) and (iii))**

22 Courts applying Rule 23(g) have placed great emphasis on proposed lead class counsel's  
 23 experience with and knowledge of the applicable law – considering it to be the “most  
 24 persuasive” factor in the Rule 23(g) analysis. *See, e.g., In re Terazosin Hydrochloride Antitrust*  
 25 *Litig.*, 220 F.R.D. 672, 702 (S.D. Fla. 2004). Proposed Interim Lead Class Counsel, and the  
 26 Movants more broadly, include recognized and proven leaders of the complex litigation bar,

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27 <sup>7</sup> Robins Geller attorneys, through their longstanding relationship with Electronic Frontier  
 28 Foundation (“EFF”), spoke with EFF early on in the process and were told that Mr. Eckhart  
 would be willing to work with any of the plaintiffs in the case.

1 have substantial experience litigating claims similar to those here, possess knowledge of the  
 2 applicable law, and have experience and expertise in handling class actions and other complex  
 3 litigation, including Internet privacy and data breach cases.

4 Here, for example, Proposed Interim Lead Class Counsel have served in leadership  
 5 positions and been involved in similar Internet-related litigation, including *Sony Data Security*  
 6 *Breach Litigation* (alleging breach of consumer data and security breach of Sony's gaming  
 7 networks); *In re DoubleClick, Inc. Privacy Litig.*, No. 00-CIV0641 (NRB) (S.D.N.Y.) (alleging  
 8 improper use of invisible web bugs and cross website cookies); *Kim et al. v. Space Pencil, Inc. et*  
 9 *al.*, No. 3:11-cv-03796-LB (N.D. Cal.) (involving tracking "cookies"); *In re T-Mobile Sidekick*  
 10 *Litig.*, No. C- 09-04854 JW (N.D. Cal.) (loss of consumer data and security breach of Microsoft  
 11 Servers); *Parke, et al. v. CardSystems Solutions, Inc., et al.*, No. CGC-05-442624 (San Francisco  
 12 Superior Court) (among the largest breaches of consumer credit card data in the United States);  
 13 *In re Michaels Stores, Inc., Pin Pad Litig.*, No. 1:11-cv-03350 (N.D. Ill.) (nationwide data breach  
 14 case); and *In re Facebook Inc. Internet Tracking Litig.*, No. 12-MD-02314-EJD (N.D. Cal.).

15 Each applicant has the expertise and skill sets that qualify him to lead this litigation.  
 16 Combined, the group of lawyers comprising Movants here is best-suited to lead this Action.

# 17 **1. Proposed Interim Lead Class Counsel**

## 18 **(a) Strange & Carpenter**

19 Strange & Carpenter is an experienced and respected class action and complex business  
 20 litigation firm led by trial lawyer Brian R. Strange.<sup>8</sup> Of particular significance in the context of  
 21 this litigation, Mr. Strange recently authored an article entitled "*Modern wiretapping*": *Can the*  
 22 *federal Wiretap Act protect consumers from the latest methods of online and mobile tracking?*  
 23 (anticipated release July/August 2012). Mr. Strange also authored *Into the Breach - Plaintiffs*  
 24 *have been increasingly successful in gaining injunctive relief for online security breaches* (Los  
 25 Angeles Lawyer, February 2012) and has been involved in several recent cases involving

26  
 27 <sup>8</sup> Mr. Strange has lectured on class actions before numerous organizations, including the  
 28 California State Bar, the Practicing Law Institute, and various consumer attorneys organizations,  
 and is frequently quoted on class actions. Mr. Strange has significant trial experience as  
 described in the firm's resume attached as Exhibit A to Strange Decl..

Internet-related issues, including domain names, data security, and personal privacy. Mr. Strange's firm resume is attached as Exhibit A to Strange Decl.

Mr. Strange has been involved in settlements with the nation's largest corporations, and has organized and coordinated numerous slates of plaintiffs' counsel in various MDLs across the country. Strange & Carpenter was chosen, among 16 applicants, by District Judge Anthony Battaglia (S.D. Cal.) to serve as one of the members of the plaintiffs' leadership team in *Sony Data Security Breach Litigation*, arising from one of the largest data security breaches in United States history. He has been at the forefront of many multidistrict and class action cases, including arguing *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), before the California Supreme Court on the issue of arbitration clauses, which will be important in this case. Mr. Strange has also been appointed lead counsel in numerous national class actions, including: (a) a nationwide settlement against AT&T Mobility LLC regarding flat-rate early termination fees for mobile phones, *Hall, et al. v. AT&T Mobility LLC f/k/a Cingular Wireless LLC, et al.*, Case No. 07-05325 (JLL) (D. N.J.); (b) *In Re: Apple iPhone 3G and 3GS MMS Marketing and Sales Practices Litig.*, MDL No. 2116 (E.D. La.) (Executive Committee member in lawsuit concerning the operation of the Apple iPhone on AT&T's 3G network); (c) *Toyota Motor Cases*, J.C.C.P. 4621 (L.A. Sup. Ct.) (Mohr, J.) (appointed Co-Lead Class Counsel in the California state coordinated proceeding involving allegations of unintended acceleration in Toyota vehicles); and is involved in the pending MDL *In re: Google Inc. Cookie Placement Consumer Privacy Litig.*, MDL No. 2358 (pursuing digital privacy class claims related to the alleged circumvention of browser privacy controls).

**(b) Robbins Geller Rudman & Dowd LLP**

As the nation's largest law firm devoted to prosecuting class action lawsuits, Robbins Geller has achieved a remarkable level of success. *See* Firm Resume of Robbins Geller, attached as Exhibit B to Strange Decl. Robbins Geller attorneys have been responsible for recoveries of more than \$45 billion for hundreds of thousands of class members. Some of Robbins Geller's noteworthy consumer and privacy class actions include: (a) *Drivers' Privacy Protection Act*: In this cutting-edge consumer privacy case, Robbins Geller attorneys represented a class of half-a-



1 million Florida drivers against a national bank for purchasing the drivers' private information  
 2 from the state department of motor vehicles for marketing purposes. *Kehoe v. Fid. Fed. Bank &*  
 3 *Trust*, 421 F.3d 1209 (11th Cir. 2005), *cert denied*, 547 U.S. 1051 (2006); and (b) *In re Trans*  
 4 *Union Corp. Privacy Litig.*, Case No. 00-CV-4729, MDL No. 1350 (E.D. Ill.): Robbins Geller  
 5 served as class counsel in MDL proceedings against Trans Union's sale of personal and financial  
 6 consumer credit-related information to third parties for target marketing purposes. Robbins  
 7 Geller is also involved in the following pending consumer technology matters: (a) *Sony Data*  
 8 *Security Breach Litigation*: Robbins Geller was also chosen to serve as one of the members of  
 9 the plaintiffs' leadership team in this MDL. (b) *In re Apple iPhone 4 Prods. Liability Litig.*,  
 10 Case No. 5:10-md-02188-RMW (N.D. Cal.): Robbins Geller currently serves as Class Counsel  
 11 with three other firms in this MDL litigation pending in this District concerning the sale and  
 12 marketing of Apple's iPhone 4.<sup>9</sup> Further, Robbins Geller has served as lead counsel in numerous  
 13 other class actions, including *In re Enron Corp. Sec. Derivative & ERISA Litig.*, where they  
 14 secured the largest recovery ever obtained in a shareholder class action (over \$7 billion). The  
 15 firm also achieved the highest *jury verdict* ever returned in favor of a shareholder class following  
 16 a six-week jury trial in *Jaffe v. Household Int't, Inc.*, No. 02-C005893 (N.D. Ill.).

## 17 **2. Proposed Executive Committee**

18 The Proposed Executive Committee consists of three members. Susman Godfrey LLP  
 19 will serve as Chair of the proposed Executive Committee. Susman Godfrey's experience is not  
 20 confined to a single practice area. Since the firm's founding in 1980, Susman Godfrey has  
 21 served as lead counsel in hundreds of antitrust class actions and complex commercial disputes  
 22 throughout the country. Susman Godfrey's practice is dedicated exclusively to litigating and  
 23 trying lawsuits. The firm has represented clients in some of the largest and most complex cases  
 24 ever litigated and has demonstrated that it has the ability and resources to handle those cases  
 25 effectively and efficiently. Susman Godfrey's unparalleled experience is more fully detailed in

26 \_\_\_\_\_  
 27 <sup>9</sup> Also, in *In re iPhone 4S Consumer Litig.*, Master File No. 4:12-cv-01127-CW (N.D. Cal.),  
 28 Judge Wilken of this District appointed Robbins Geller and two other law firms interim class  
 counsel in litigation concerning the sale and marketing of Apple's iPhone 4S smartphone with a  
 defective and predominant feature known as "Siri," a voice-activated assistant.

1 its firm resume attached as Exhibit C to Strange Decl. Finally, Susman Godfrey has over 90  
 2 lawyers in five different offices stretching from coast to coast. Susman Godfrey will fully  
 3 commit the necessary resources to assist in the efficient prosecution of this case.

4 Committee member Pomerantz Haudek Grossman & Gross LLP, a 27-lawyer firm with  
 5 three offices, was founded in 1936 by a recognized pioneer of class action practice. It has a  
 6 consistent record of landmark decisions for plaintiffs, often achieved as lead or co-lead counsel  
 7 of complex class action litigation. The *National Law Journal* named Pomerantz to its prestigious  
 8 2011 Plaintiffs' Hot List for its "cutting edge" work, including \$575 million in negotiated  
 9 securities and ERISA settlements in 2010 on cases such as *In re Comverse Tech. Sec. Litig.*, No.  
 10 06-CV-1825 (E.D.N.Y.) (\$225 million settlement) and *Am. Medical Ass'n v. United Healthcare*  
 11 *Corp.*, Master File No. 00-CV-2800-LLM-GWG (S.D.N.Y.) (\$350 million settlement).  
 12 Pomerantz has been active in the Carrier IQ litigation thus far, having already engaged in  
 13 confidential informal discovery with multiple device manufacturer Defendants. Pomerantz's  
 14 extensive firm resume, highlighting the firm's class action expertise across securities, antitrust,  
 15 insurance, and other types of litigation, is attached as Exhibit D to Strange Decl.<sup>10</sup>

16 Committee Member McNulty Law Firm,<sup>11</sup> with offices in Los Angeles and Hong Kong,  
 17 has substantial trial and class action experience, specializing in the preparation and trial of  
 18 catastrophic personal injury actions and complicated commercial actions with a special emphasis  
 19

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20 <sup>10</sup> Pomerantz has co-counseled with Glancy Binkow & Goldberg LLP, which has offices in Los  
 21 Angeles and San Francisco, and has pertinent Internet privacy/data breach litigation experience  
 22 in cases such as *In re Zappos Security Breach Litig.*, No. 12-cv-00182-ECR-VCF (D. NV)  
 23 (leadership role) and *In re: Facebook, Inc. Internet Tracking Litig.*, No. 12-md-02314-EJD (N.D.  
 24 Cal.), and has successfully argued against the enforceability of arbitration provisions in *In re*  
 25 *Toyota Motor Corp. Hybrid Brake Marketing, Sales, Practices and Products Liability Litig.*, 828  
 26 F.supp.2d 1150 (C.D. Ca. 2011). The Glancy firm supports Movants' application as set forth  
 27 herein.

28 <sup>11</sup> The proposed participation of the McNulty Law Firm on the Executive Committee will include  
 support from four additional law firms: (1) Stewarts Law, (2) Keefe Bartels, (3) Eichen,  
 Crutchlow, Zaslow & McElroy, and (4) Litigation Partners, P.L. These firms have substantial  
 experience with class action practice and digital privacy actions in particular. For example,  
 Stewarts Law is co-lead counsel (and Keefe Bartels and Eichen Crutchlow are on the plaintiffs'  
 steering committee) in the high-profile privacy action against Facebook related to alleged  
 improper tacking of users' internet browsing, *In re: Facebook Internet Tracking Litig.*, 5:12-md-  
 2314-EJD (N.D. Cal.), a case which involves many of the same causes of action and legal  
 theories likely to be at issue in this Action.



1 in Class Action/Mass Tort Litigation. Mr. McNulty has tried over 100 cases to verdict and has  
 2 been involved in multiple nationwide class actions, including privacy litigation such as *Anthony*  
 3 *v. Yahoo! Inc.*, Case No. CV 05-04175 RMW (N.D. Cal.). McNulty Law Firm's resume is  
 4 attached as Exhibit E to Strange Decl.

### 5 **3. Proposed Liaison Counsel: Rothken Law Firm, LLP**

6 The Rothken Law Firm, led by Ira P. Rothken, a former medical researcher and computer  
 7 scientist, began the Northern California-based Rothken Law Firm in 1993, and the firm has  
 8 evolved from the beginning of the modern internet in 1995 to emphasize complex high  
 9 technology-related litigation. The firm has been involved in a number of groundbreaking mass  
 10 action high technology cases requiring the blend of both technical and legal skills.<sup>12</sup>

11 Mr. Rothken is actively involved in handling cutting edge issues in electronic discovery  
 12 both in complex data-centric cases and in a legal think tank. Mr. Rothken is an active member of  
 13 the cutting edge Sedona Conference® Working Group 1, and assisted in the drafting of the  
 14 *Sedona Conference Cooperation Proclamation* on E-Discovery for the Judiciary.<sup>13</sup> Mr.  
 15 Rothken's firm resume is attached as Exhibit F to Strange Decl.

#### 16 **c. Proposed Interim Lead Class Counsel's Willingness and Availability to** 17 **Commit to a Time-Consuming Project**

18 Proposed Interim Lead Class Counsel's track record of effectively prosecuting complex  
 19 class actions reflects their willingness to commit the resources and time necessary to effectively  
 20 prosecute this Action. On many occasions, Proposed Interim Lead Class Counsel, and the

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21 <sup>12</sup> Mr. Rothken, while serving as Liaison Counsel, will also participate in the substantive work  
 22 in light of his expertise as set forth herein. Mr. Rothken was also co-lead class counsel  
 23 representing owners of Palm Treo 600 and 650 Smartphones in a nationwide federal class action  
 24 lawsuit entitled *In re Palm Treo*, claiming the devices are inherently defective, resulting in a  
 25 multi-million dollar nationwide class recovery; co-lead representing owners of the T-Mobile  
 26 Sidekick Smartphones in a nationwide federal class action entitled *In re Sidekick*, claiming a  
 27 massive corruption of data integrity and interruption of consumer data access; co-lead class  
 28 counsel and court-ordered liaison counsel representing owners of the Apple iPhone 4  
 Smartphones in a nationwide federal class action entitled *In re Apple iPhone 4* (also known as  
 "Antenna-gate") claiming defective antenna design; and co-lead settlement class counsel in a  
 nationwide consumer privacy lawsuit brought against DoubleClick for allegedly intruding on  
 web user privacy in *In re DoubleClick*, resulting in a nationwide class settlement.

<sup>13</sup> See p. 3, [http://www.fjc.gov/public/pdf.nsf/lookup/SedonaRes.pdf/\\$file/SedonaRes.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/SedonaRes.pdf/$file/SedonaRes.pdf). Mr.  
 Rothken also co-edited a leading Commentary on the issues of preserving, managing, and  
 identifying not reasonably accessible electronically stored information or "NRA ESI".

1 Movants more broadly, have prosecuted cases lasting many years and requiring a significant  
2 commitment of resources.

3 Proposed Interim Lead Class Counsel have the capital and personnel necessary to  
4 represent Plaintiffs and the proposed class and have already demonstrated a willingness to  
5 expend these resources to effectively and efficiently prosecute this Action. Indeed, based on  
6 their experience in filing and successfully litigating data breach and other class actions, Proposed  
7 Interim Lead Class Counsel fully understand the substantial investment of time and resources  
8 necessary to properly pursue and lead such litigation and are committed to devoting the  
9 necessary resources to this case. Indeed, collectively, each of the Movants is a well-capitalized  
10 firm, and together they have over 300 lawyers in 20 offices, making it the only moving group  
11 with the resources necessary to compete against the firms hired by Defendants, which are among  
12 the largest in the world.

13 In addition to the specific Rule 23(g) appointment criteria, which, as explained above  
14 Proposed Interim Lead Class Counsel readily satisfy, there are several other material factors that  
15 further strengthen Proposed Interim Lead Class Counsel's appointment request here:

16 **d. Ability to Cooperatively Work with Others**

17 A key factor in choosing counsel is that the court-appointed leadership of a case will not  
18 only effectively lead the MDL, in terms of task-managing and advancing litigation strategy, but  
19 also that it inclusively works with *all* counsel toward a fair and efficient resolution. Movants are  
20 supported by numerous firms listed herein in Footnote 1. Significantly, however, Movants will  
21 work cooperatively with *any* counsel selected by the Court,<sup>14</sup> and do not believe that the Court  
22 must pick one proposed leadership slate to the total exclusion of the other.<sup>15</sup>

23 As another example of the ability to work cooperatively with others, Proposed Interim  
24

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25 <sup>14</sup> Movants note that Steve W. Berman filed his Declaration in Support of Hagens Berman Sobol  
26 Shapiro LLP and Pearson, Simon, Warshaw & Penny, LLP's Motion for Appointment as Interim  
Co-lead Counsel with the Court under seal (*see* Dkt. No. 67).

27 <sup>15</sup> In fact, in *Sony Data Security Breach Litigation*, Judge Battaglia chose Strange & Carpenter  
28 from one group and Robbins Geller from another, and they are now submitting this joint  
application together, evidencing their ability to work cooperatively with different camps.

1 Lead Class Counsel has been in contact with the only other state court action raising similar  
 2 claims (remanded by Judge Feess), *Eckert v. Samsung Telecommunications America LLC*, Los  
 3 Angeles Superior Court Case Number BC 474540. Movants are coordinating this MDL thus far  
 4 with counsel in *Eckert*, who are also in support of the leadership group, to promote efficiency  
 5 and avoid duplication. (Strange Decl., ¶ 7.) Movants respectfully submit that reaching out and  
 6 coordinating with state court counsel is exactly the type of cooperation that will advance this  
 7 Action in an effective and efficient manner.

8 **e. Qualifications, Including Experience Managing Complex Litigation**  
 9 **and Knowledge of the Subject Matter**

10 Like the many fine firms seeking a leadership role in this Action, Movants have extensive  
 11 experience in managing complex litigation. Movants respectfully submit however, that their  
 12 knowledge of the subject matter is unparalleled, for example, having written very recent articles  
 13 on this specific subject matter, *supra*, and litigating recent class actions on the same claims.

14 Defendants indicated at the May 24, 2012 Initial Case Management Conference that they  
 15 will file a motion to compel arbitration. Movants have been at the forefront of arbitration issues  
 16 in the consumer context for years, as set forth herein.<sup>16</sup> Since the Defendants have announced  
 17 this is one of their defenses front and center, this becomes an important part of the Action.

18 **f. Counsel's Anticipated Litigation and Discovery Plan for the MDL**

19 Discovery should be conducted in phases and include the software code, software  
 20 installation/update methods and timing, data flow, interface design, data use, data storage, data  
 21 analytics, contractual arrangements regarding the software and data, and data lifecycle at issue.  
 22 At least with respect to some mobile devices (*e.g.*, HTC Android phones), the software is  
 23 installed and configured prior to the device being connected to the mobile network. The first  
 24 order of business will be researching these issues and drafting a consolidated amended complaint  
 25 that includes only the proper parties, including certain additional defendants that Movants are

26 <sup>16</sup> Here, too, counsel supporting Movants have extensive experience arguing against the  
 27 enforceability of arbitration clauses. For instance, Glancy Binkow successfully argued against  
 28 enforceability of such clauses by a non-party to the retail sales contracts containing them in *In re*  
*Toyota Motor Corp. Hybrid Brake Marketing, Sales, Practices and Products Liability Litig.*, 828  
 F.Supp.2d 1150 (C.D. Cal. 2011).

1 currently investigating. The participants in this leadership structure are particularly well-versed  
 2 since they have named the two manufacturers who had the Carrier IQ software placed in them  
 3 that were not named by other Plaintiffs' groups.<sup>17</sup> Moreover, Proposed Interim Lead Class  
 4 Counsel's analysis of Carrier IQ software performed prior to the filing of any complaints will be  
 5 helpful in filing the consolidated amended complaint. (*See* discussion *supra*, Sec. III(a).). The  
 6 Civil Minutes dated May 24, 2012 for procedures requiring filing of the consolidated amended  
 7 complaint, protective orders and Rule 26 disclosures were proposed by Strange & Carpenter.

8 The first phase of discovery will likely center on the class members' arbitration clauses  
 9 (in their wireless communications service contracts) and their relationship with each of the  
 10 Defendant device manufacturers will be critical.<sup>18</sup> Following a decision on the motion to compel  
 11 arbitration, Movants propose that the second phase of discovery include both class certification  
 12 and merits based discovery so as to maximize efficiencies. Movants maintain that class and  
 13 merits discovery bifurcation is unnecessary.

14 After a firm understanding is gained of these issues, and appropriate class certification  
 15 discovery is completed, Movants would respectfully suggest that a schedule be set for class  
 16 certification briefing and argument, dispositive motions, and trial.

17 **g. Counsel's Fee Structure and Anticipated Costs**

18 Movants respectfully submit that, as to the matter of an appropriate percentage-of-  
 19 common-fund award, in the event a class judgment is obtained, or a class settlement is approved,  
 20 the Ninth Circuit's well-developed common fund jurisprudence provides guidance and an  
 21 adjustable benchmark, within which the Court's discretion in awarding fees may be predictably  
 22 exercised. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1994) (citing *Paul*,  
 23 *Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989)). Movants have made no  
 24 promises of fee splitting, either amongst themselves or among the broader Plaintiffs' group.

25 \_\_\_\_\_  
 26 <sup>17</sup> Pantech and Huawei have only been named in suits filed by Movants. Movants have also  
 27 identified the following device manufacturers as having the Carrier IQ software installed, but  
 28 which have not been named in any federal lawsuits: Audiovox, Kyocera, Sanyo, Sony Mobile,  
 PalmOne, ZTE, Franklin Wireless, Novatel, and Sierra Wireless.

<sup>18</sup> A sample of such arbitration-related discovery is attached to Strange Decl. as Exhibit I.

1 Anticipated costs at this point are primarily expert costs and depositions. These should not be  
2 out of the ordinary in this case.

3 **h. Guidelines to Control Fees and Costs**

4 Movants will implement a system of contemporaneous periodic time and expense  
5 reporting requirements imposed on all counsel so that the costs, expenses, and time for attorneys'  
6 services incurred in this Action so that the same may be monitored and supervised on an ongoing  
7 basis. Movants will further institute controls over work that may be the subject of application for  
8 fees, including a requirement that all work for which such compensation will be sought be  
9 authorized in advance. Monthly reports of time to a centralized party for review by designated  
10 counsel to eliminate any unauthorized or excessive time or costs would facilitate any fee request  
11 at the end of the case. Thus, at any given time, Movants would know how much time and effort  
12 was and is being spent by each firm. Attached as Exhibit H to Strange Decl. are General  
13 Guidelines for Fee and Expense Allocation, which can be implemented to ensure compliance at  
14 the outset with billing policies. Use of paralegals, when appropriate, and of predictive coding of  
15 e-discovery can also save time.

16 **i. Counsel's Plan for Allocating Work Among the Leadership Team and With  
17 Other Counsel**

18 Proposed Interim Lead Class Counsel would be responsible for allocating work for the  
19 common benefit of the class, to the Executive Committee and also to other counsel in the case  
20 who are not on the Executive Committee. Any firm assigned specific assignments by Proposed  
21 Interim Lead Class Counsel would have to accept and agree to the General Guidelines for Fee  
22 and Expense Allocation (Ex. H, Strange Decl.) By way of example, it is Movants' experience  
23 that allocating discovery regarding a specific defendant to a specific plaintiff's firm or group of  
24 firms is helpful and will avoid duplicative effort. Likewise, briefing on certain motions can be  
25 delegated amongst a subset of firms to ensure efficient generation of work product. Weekly  
26 telephone conferences to discuss work allocation are helpful.

27 **j. Counsel's Views of Size and a Specific Role of the Executive Committee**

28 Movants respectfully submit that given the large scope of this litigation, and the extensive  
work required at each phase, an Executive Committee of three firms whose members can more

1 closely oversee discrete pieces of the litigation and work by non-committee firms will greatly  
 2 enhance the ability of Proposed Interim Lead Class Counsel to advance this Action expeditiously  
 3 to resolution.

4 Executive Committee Members will play an active role in the leadership of the case and  
 5 assist in overseeing work on discrete pieces of this litigation. For example, Executive  
 6 Committee Members can oversee: (1) work by firms concentrating on the technological  
 7 workings of the Carrier IQ software; and (2) work by firms tasked with device manufacturer-  
 8 specific investigation and discovery. Utilizing a three-person Executive Committee in this way,  
 9 given the number of named and potential Defendants, would add much-needed accountability  
 10 and attention, while freeing Proposed Interim Lead Class Counsel to focus on overall leadership  
 11 of the case. Utilizing a three-person Executive Committee in this way, given the number of  
 12 named and potential Defendants, would be extremely helpful so that Proposed Interim Lead  
 13 Class Counsel can focus on overall leadership of the case.

14 Proposed Interim Lead Class Counsel can minimize any duplication of fees and costs  
 15 resulting from this additional level of governance by a regular monthly review of fees and costs,  
 16 as set forth above, and by a weekly teleconference with the Executive Committee firms to review  
 17 their work and the work by any other firms that they are overseeing. This approach ensures that  
 18 more Plaintiffs' lawyers are involved in the case, but that it is handled in an efficient  
 19 management style, as if handled by one firm. The benefits include utilizing a larger group of  
 20 talented lawyers who bring significant resources and different perspectives to solving the case.

#### 21 **IV. CONCLUSION**

22 Movants respectfully request this Court grant the appointment of the firms in this  
 23 application, or in the alternative, Movants will work cooperatively with any firm the Court  
 24 chooses to appoint and will work efficiently within any structure the Court decides to create.  
 25 Movants would be happy to respond to any additional questions posed by the Court.

26 DATED: June 8, 2012

Respectfully submitted,

27 /s/ Brian R. Strange  
 28 STRANGE & CARPENTER

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**CERTIFICATE OF SERVICE**

I hereby certify that this document is being filed through the ECF system and will be sent electronically to the registered participants as identified on the Electronic Mail Notice List, and paper copies will be sent to those indicated as non-registered participants.

Dated: June 8, 2012

Respectfully submitted,

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